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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL LYN ESTEP,

Defendant and Appellant.

C060690

(Super. Ct. No.  
CM023684)

A jury convicted defendant Daniel Lyn Estep of voluntary manslaughter (Pen. Code, § 192; undesignated statutory references that follow are to the Penal Code) and found he personally used a firearm (§ 12022.5, subd. (a)). The trial court found defendant had served a previous prison term within the meaning of section 667.5, subdivision (b). The court sentenced defendant to 22 years in state prison. Defendant appealed.

This court affirmed the judgment but found merit in defendant's challenge to his upper-term sentence and remanded for resentencing consistent with *Cunningham v. California* (2007)

549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*)), *People v. Black* (2007) 41 Cal.4th 799 (*Black*), and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*).

On remand, the trial court struck the enhancement for the prior prison term, then sentenced defendant to a 15-year prison term, consisting of the upper term of 11 years for the principal offense, plus the middle term of four years for use of a firearm.

Defendant appeals the sentence, contending that the court based its decision to impose the upper term on factors previously used and disapproved, and on facts not justified by the record, thus abusing its discretion. He further contends the upper-term sentence was based on facts not submitted to a jury in violation of *Cunningham* and the Sixth and Fourteenth Amendments to the United States Constitution. We will affirm the judgment.

## FACTS AND PROCEEDINGS

The facts are taken almost verbatim from our previous opinion in defendant's first appeal, case No. C053984.

### *Prosecution Case*

The prosecution witnesses told essentially the same story about the events that night. The evening of the shooting, Dustin B., a friend of Jamie and her brothers, Gary and Brandon, came by the apartment where Jamie and Gary lived. Jamie's cousin Brandy S. was there. Jamie was drinking beer. She did

not appear intoxicated, but it was stipulated her blood alcohol level at her death was .12 percent.

They were on the front porch and Jamie was telling the story of how a man in a stolen car had spun out in front of the apartment several months earlier. Defendant walked by and overheard the conversation. He got angry and said, "[y]ou think that's funny?" Defendant said he was the one who stole the car and threatened to come back with others "to fuck you guys up[.]" Jamie told Gary about the threat and Gary called the sheriff. He was told to get inside, lock the door and call back if the men returned. He did not tell the others to do so. Afterwards two cars drove by and the men inside yelled at the Brandon M. group.

Later that night, Shane K. and Brandon M. came over; they had been at Wal-Mart getting pictures made of their children. They were told about the earlier threat and that the police were not coming out.

The Brandon M. group saw defendant and another man walking down the street towards the apartment with a flashlight. Defendant had a bar in his hand. Brandon and Dustin walked down the street and confronted the two men; they fought. Dustin fought defendant; defendant threw his bar at Dustin and Dustin picked it up. Defendant tripped backing up and then ran into his house. Jamie and Brandy followed Dustin and Brandon.

Defendant came out of the house with something in his hand. Someone yelled, "He's got a gun." There was a gunshot and the group ran. Shane grabbed a baseball bat and ran to the street.

Jamie yelled that she had been shot and fell. They carried her back to the apartment. Gary's girlfriend called the police.

Jamie died from injuries from multiple gunshot wounds. She was erect when shot and hit by approximately 85 pellets. The shotgun was fired from a distance of 40 to 50 feet away.

An open knife was found in the street, 280 feet from defendant's gate. There was a large amount of blood on the knife; it was stipulated the blood was Jamie's. The ballistics expert testified the knife's condition was consistent with someone running with it with the sharp end down. Dustin, Brandy, Gary, and Brandon claimed they never saw the knife that night. Gary testified Jamie carries a knife only to fish or cook.

A baseball bat was found 394 feet from defendant's gate. It was stipulated that Shane's fingerprint was on the bat.

#### *Defense Case*

The defense provided a starkly different version of events. About three months before the shooting, there was an incident when a car spun out and the driver ran into defendant's yard. The police arrived and chased the driver, going into defendant's house. Defendant was never a suspect; he cooperated with the police when they arrived.

The night of the shooting defendant's son left shortly before midnight to go to the bay area. When he left, defendant was welding a bike stand. As he drove past the apartments, the son saw about 10 people having a barbeque.

Defendant, who had a prior felony conviction, walked past the apartments that day looking for his dog. The people at the apartment were talking about the car that spun out months earlier. They were loud and accusing him of being the driver. When defendant said it was not him, a guy stood up and said the girl could say what she wanted. Angry words were exchanged.

That night defendant was working on his bike when he saw the group coming towards his house. He grabbed a spotlight and walked to the edge of the driveway. A man told defendant to "get the fucking light" out of his eyes. Defendant dropped the light and picked up a bar or pipe. The man put down his beer and picked up a rock; as he threw the rock he said, "break out the pistols." Defendant threw the pipe at him and ran back into his yard. The man swung at him and defendant slipped. The man picked up the pipe.

Terrified, defendant ran into his mother's house and got a shotgun. The group was coming up the driveway and into the yard. Believing they had weapons, defendant shot towards the gate. He went in the house to get another shotgun shell. The group left and defendant told his mother to call the police; he may have shot someone.

Deputy Sheriff William Olive testified for the defense. When he arrived at Jamie's there were people yelling and cursing at him. He had to put people on the ground at gunpoint to retain control. They threatened to take care of defendant if the police did not. Brandon told him Jamie went to defendant's by herself; he did not mention two men or the fight. Dustin,

Shane, and Gary all said they were inside when the shooting occurred. Shane did not mention the bat. Gary said they were all drinking that night, having a party. Brandy told the officer she, Jamie, Dustin and Shane were near defendant's and having an argument. Defendant ran into the house and got a shotgun and fired. She did not mention the second man or the fight.

Dustin denied he ever spoke to the police that night. Brandon denied he made the statements attributed to him in the police report. He claimed he told the police about the second man and the fight; he gave a brief description of everything that happened. Brandon and Gary denied they got together with the others and made up a story.

## DISCUSSION

Defendant contends the upper-term sentence contravened *Cunningham* and the Sixth and Fourteenth Amendments to the United States Constitution because it was based on facts not submitted to a jury. He next contends that the court abused its discretion by basing its determination on facts not supported by the record, such as defendant's ongoing violence against women, the fact that defendant, being a prior felon, "had no right to be in possession of a firearm" and was therefore a danger to society, and that defendant undertook the crime with cruelty and callousness. As we shall explain, the first contention lacks merit because the court based its decision to impose the upper

term on the fact that defendant had served a prior prison term and we therefore need not address the second.

Section 1170 provides, in relevant part, as follows: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term that, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170, subd. (b).) Defendant was sentenced on remand after section 1170 was amended to grant the trial court broad discretion to impose any term in the triad, that is, the low term, the midterm, or the upper term, by simply stating the reasons for its sentencing choice. (*Sandoval, supra*, 41 Cal.4th at pp. 850-851.)

In announcing its decision to impose the upper term, the trial court stated, "[T]o reduce the verdict to voluntary manslaughter, the jury had only to find that the People had not proven beyond a reasonable doubt that the defendant did not act in imperfect self-defense. The jury made no specific finding that he did so act. [¶] If the verdict can be explained by the People's failure to prove a negative beyond a reasonable doubt, a very difficult task, the Court in sentencing can still consider issues of cruelty, callousness, and danger to society using a preponderance standard. [¶] Putting that aside, there are other reasons that support the imposition of the 11-year term for manslaughter. First, although the defendant's prior

convictions are not numerous or increasing in seriousness prior to the instant serious offenses, these prior convictions do show an ongoing pattern of violence against women. The defendant was convicted of [section] 273.5(a), corporal injury to a spouse or cohabitant, in January on the 30th of that month in 1987 and given one year in jail and three years['] probation in Contra Costa County. [¶] Defendant was again convicted of [section] 273.5 on June 28th of 1991 and received 120 days in jail. [¶] The defendant was also convicted of a felony, [section] 11379.6(a) of the Health and Safety Code, manufacturing of methamphetamine on August 24th of 1999 in Butte County for which he received three years in state prison. [¶] As a prior felon, defendant had no right to be in possession of a firearm, let alone a loaded shotgun propped up next to the front door. Such a person is a danger to society. [¶] *The Court will strike the punishment to be imposed for the prior prison term and include this as an additional factor which supports selecting the 11-year term for voluntary manslaughter.*" (Italics added.)

The trial court's imposition of the upper term did not violate defendant's Sixth and Fourteenth Amendment rights as discussed in *Cunningham*, which held that, other than a prior conviction, the facts reflected by a jury's verdict, or those facts admitted by the defendant, any fact that increases the punishment for an offense beyond the statutory maximum, that is, the middle term, must be tried by a jury and proved beyond a reasonable doubt. (*Cunningham, supra*, 549 U.S. at pp. 274-275,



282-283, 288-289, 293 [166 L.Ed.2d at pp. 864-865, 869-870, 873, 876].) Here, the court cited several factors in support of the upper term: (1) Defendant's prior convictions for corporal injury to a spouse or cohabitant which, in the court's opinion, showed "an ongoing pattern of violence against women," (2) the fact that defendant "had no right to be in possession of a firearm, let alone a loaded shotgun propped up next to the front door," making him a "danger to society," and (3) defendant's prior prison term. The trial court, in a bifurcated proceeding, found the prior prison term true beyond a reasonable doubt. We also note that the felony convictions to which the court referred were undisputed at trial and remain undisputed on appeal. "[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black, supra*, 41 Cal.4th at p. 816.) Defendant was eligible for the upper term based on his prior prison term. (*Ibid.*; *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223.) The fact that the trial court also stated other reasons for the upper term is of no moment. The trial court's imposition of the upper term did not contravene the rule in *Cunningham* and did not violate defendant's Sixth or Fourteenth Amendment rights. Because defendant's prior prison term was a valid ground for imposing the upper term, we need not consider whether any of the court's other grounds were invalid. (*Sandoval, supra*,

41 Cal.4th at p. 837; *Black*, at p. 816.) We therefore need not consider defendant's claim that the trial court abused its discretion in relying on grounds other than his prior prison term.

#### DISPOSITION

The judgment is affirmed.

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HULL, J.

We concur:

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SIMS, Acting P. J.

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NICHOLSON, J.